

NOT FOR PUBLICATION**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE MICHAEL ANTHONY  
GONZALES,

Debtor.

BAP No. NM-06-091

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MARY ROMERO,

Plaintiff – Appellant,

v.

MICHAEL ANTHONY GONZALES,

Defendant – Appellee.

Bankr. No. 7-03-13011-SA  
Adv. No. 03-1303-S  
Chapter 7

ORDER AND JUDGMENT\*

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Appeal from the United States Bankruptcy Court  
for the District of New Mexico

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Before BOHANON, CORNISH, and THURMAN, Bankruptcy Judges.

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THURMAN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument. Appellant, Mary Romero, appeals a bankruptcy court judgment denying her claim that she suffered a loss of real property by virtue of Debtor's wrongful conduct. We

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

affirm.<sup>1</sup>

## I. BACKGROUND

Appellant and Debtor met and began a relationship in 1995, shortly after the death of Appellant's husband. The parties' characterizations of their relationship differed significantly, with Appellant asserting that the relationship was romantic and proceeding toward marriage, while Debtor claimed the relationship was a "friendship," consisting primarily of casual, non-monogamous sex. The parties agreed that, in May 1997, Appellant purchased a house and lot from her brother that was located in an area owned mostly by Appellant's family members (the "Patrick property"). Appellant used approximately \$30,000 as a down-payment on the Patrick property, which she had received in benefits after her husband's death. In making this purchase, Appellant obtained a mortgage in the amount of approximately \$102,000, for which her brother and sister-in-law co-signed. Due at least in part to Appellant's prior credit problems, the mortgage carried an unfavorable interest rate of 11.85%.

Approximately ten months later, in March 1998, Appellant signed a warranty deed to the Patrick property, naming Debtor as the sole owner. The parties' accounts of this transfer also differ dramatically. Appellant contends that she and Debtor were engaged to be married at that time and had discussed refinancing the property to obtain a lower interest rate, but that her poor credit prevented her from doing so on her own. Appellant claimed that Debtor had a

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<sup>1</sup> The bankruptcy court also awarded Appellant non-dischargeable monetary damages on her claim for loss of personal property. However, since that ruling was not appealed by either party, and the bankruptcy court's decision denying Appellant's other claim for damages is affirmed herein, we need not reach the issue of whether bankruptcy courts have authority to award money damages in a § 523 proceeding. Although there is no Tenth Circuit precedent on that issue, this Court has previously held, in a divided decision, that bankruptcy courts do have such authority pursuant to 28 U.S.C. § 157. *See Lang v. Lang (In re Lang)*, 293 B.R. 501, 517 (10th Cir. BAP 2003). *But see Porter Capital Corp. v. Hamilton (In re Hamilton)*, 282 B.R. 22 (Bankr. W.D. Okla. 2002).

friend whose wife was a realtor and could get them a 7% mortgage, and that Debtor arranged to have a deed prepared. The day before Appellant was to sign the deed, she learned that the property was to be deeded only to Debtor, rather than to herself and Debtor, as she had expected. When confronted about this discrepancy, Debtor told Appellant that it wouldn't matter because she would get half of the property when they married. In addition, Debtor threatened to hurt Appellant or himself if she refused to sign the deed. Because she loved him, intended to marry him, and believed that he would harm himself, Appellant and her brother and sister-in-law signed the deed the following day.

On the other hand, Debtor claimed that he never wanted the Patrick property, that he and Appellant never discussed refinancing it, and that she simply threw the executed deed in his lap, telling him that the property was now his problem. Debtor claimed no prior knowledge of, or involvement in, preparation of the deed, and also that he believed that his name on the deed obligated him to make the property payments. At that time, Appellant had not paid the taxes on the Patrick property, and Debtor subsequently paid nearly \$1,500 to the county for back taxes. Debtor owned at that time, and continues to own, another house in which he resided.

Between 1997 and 2001, the Patrick property was almost continuously rented out, but the rental payments were insufficient to cover the property's mortgage, insurance, and taxes. Debtor "managed" the property, including finding renters, collecting rent, and making the mortgage payments. In 2000, Debtor refinanced the Patrick property into his own name and obtained \$19,000 cash in the process. In March 2001, Debtor moved into the Patrick property and rented out his own home. He continued making payments on the Patrick property for some period of time. However, Debtor lost his job at Furr's Supermarkets when that entity filed bankruptcy, and was unable to continue making payments on both his property and the Patrick property.

The relationship between the parties worsened over time, culminating in a physical altercation between them in October 2001, after Appellant witnessed another woman arrive at the Patrick property. Within a day or two of this fight, Appellant returned to the Patrick property with a police escort, in order to retrieve her personal property. Thereafter, the parties were both subject to mutual restraining orders that prevented them from contacting each other. Appellant testified that she repeatedly requested return of the Patrick property from Debtor, both before and after this rather abrupt ending of their relationship, but that he always refused. Debtor testified that Appellant only asked him to return the property once, and that he had told her that he would, but only if she paid him the money he had put into it. According to Debtor, he had spent approximately \$15,000 on the Patrick property at that time, but requested only \$12,000 from Appellant.

In March 2003, Appellant filed a civil suit against Debtor in state court, seeking return of the Patrick property. Debtor filed a Chapter 13 bankruptcy petition in April 2003, which he voluntarily converted to a Chapter 7 shortly thereafter. A few months later, the Patrick property's mortgagee obtained relief from the automatic stay and initiated foreclosure proceedings. In September 2003, the Patrick property was purchased at a foreclosure sale by a friend of Appellant for \$143,000.

After Debtor filed his petition in bankruptcy, Appellant initiated an adversary proceeding against him, seeking to have her claims against him excepted from discharge pursuant to 11 U.S.C. § 523(a)(2),(4), and (6). A trial was held on Appellant's claims in November 2004. At the conclusion of Appellant's case, the bankruptcy court dismissed her claim under § 523(a)(4),

pursuant to Debtor's motion to dismiss.<sup>2</sup> After trial, the court awarded Appellant monetary damages for loss of certain personal property, but denied her claim for damages related to the Patrick property. Appellant's subsequent motion for reconsideration of the Patrick property claim was denied.

## II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.<sup>3</sup> Because the notice of appeal was timely filed within ten days of a final order, and because neither party to this appeal has elected to have the appeal heard by the district court, this Court has appellate jurisdiction.

## III. ISSUE AND STANDARD OF REVIEW

The only issue on appeal is whether the bankruptcy court properly denied Appellant's claim for damages related to the Patrick property on the ground that she failed to show that Debtor's conduct had caused her loss. This issue presents a mixed question of law and fact. This Court reviews a trial court's legal conclusions that are based on uncontested facts *de novo*.<sup>4</sup> However, to the extent that fact findings underlie a legal conclusion, we review those findings under the clearly erroneous standard.<sup>5</sup> A factual finding is "clearly erroneous" when "it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been

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<sup>2</sup> Appellant did not appeal this ruling.

<sup>3</sup> 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

<sup>4</sup> *Hofer v. Unum Life Ins. Co. of Am.*, 441 F.3d 872, 875 (10th Cir. 2006); *In re Thompson*, 240 B.R. 776, 779 (10th Cir. BAP 1999).

<sup>5</sup> *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

made.’’<sup>6</sup> Additionally, we note that the Bankruptcy Code must be construed liberally in favor of the debtor and strictly against the creditor.<sup>7</sup>

#### IV. DISCUSSION

##### A. Pending Motions

As an initial matter, we note that Appellant’s opening brief was filed on November 30, 2006, one day beyond the 30-day extension previously given her for the filing of her brief. Debtor moved to dismiss the appeal on the basis of the late filing, while Appellant moved for this Court’s acceptance of the late brief.<sup>8</sup> From the record, it appears that Debtor was in no way prejudiced by Appellant’s one day delay, in fact having received a nearly two month extension of the filing date for his own brief. Accordingly, we deny Debtor’s motion for dismissal and grant Appellant’s motion to accept brief out of time.

##### B. Section 523(a)(2)(A) Claim

Section 523(a)(2)(A) creates an exception to discharge for claims of money or property “*to the extent obtained*, by (A) false pretenses, a false representation, or actual fraud” (emphasis added). Section 523(a)(6) creates a similar exception “for willful and malicious injury by the debtor to another entity or to the property of another entity[.]” The bankruptcy court found that Appellant had met her burden of proof under these provisions with respect to a 1949 Ford tractor and various personal property items, and awarded her \$1,190 damages for the personal items, plus either \$3,000 in damages or the return of her tractor. Appellant’s claim for damages relating to the Patrick property was denied on the ground that,

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<sup>6</sup> *Id.* (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

<sup>7</sup> *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292-93 (10th Cir. 1997) (citing *Bank of Pa. v. Adlman (In re Adlman)*, 541 F.2d 999, 1003 (2d Cir. 1976)).

<sup>8</sup> Debtor’s motion was filed December 15, 2006, and Appellant’s motion was filed December 26, 2006. By order entered January 17, 2007, both motions were referred to the Court for consideration.

although she was misled by Debtor into deeding him the property, the Debtor's misrepresentations were not the proximate cause of Appellant's loss of the Patrick property.

In order to recover on her § 523(a)(2)(A) claim, Appellant must establish, by a preponderance of the evidence, the following five elements:

- 1) Debtor made a false representation;
- 2) with the intent to deceive her;
- 3) she relied on the representation;
- 4) her reliance on the representation was reasonable;<sup>9</sup> and
- 5) the representation caused her to sustain a loss.

*See Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996).

The bankruptcy court found that Appellant had met her burden of proof with respect to the first four of these elements. However, Appellant failed to persuade the bankruptcy court that Debtor's conduct had caused her to lose the Patrick property:

Concerning 1833 Patrick, it appears clear that [Appellant] was not and would not have been able to maintain the property. She already had a track record of losing the Griegos property despite renting it out. For [the Patrick] property it appears that the rents were routinely less than the mortgage payment and taxes, at least when there were rental payments being made. [Appellant] also filed a chapter 7 in 1999 . . . and a chapter 13 in 2000 . . . that failed. In April 2003 she was forced to file her second chapter 13 case . . . . When she turned 1833 Patrick over to [Debtor] in March 1998, about a year after she had purchased, she was already behind on the payments, including the real estate taxes. Indeed, one of the reasons for deeding the property to [Debtor] (with or without her name on the new deed) was to obtain a lower interest rate. [Appellant] had the burden to prove that she could have continued to pay for 1833 Patrick and thus preserve the property, or that had she not turned it over to [Debtor] (or promptly gotten it back when she asked), there was enough equity in the property for her to have sold it and realized some equity, and that she would have done so. There was no such

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<sup>9</sup> This element was interpreted by the United States Supreme Court to require only "justifiable" reliance. *See Field v. Mans*, 516 U.S. 59, 74-75 (1995). In any event, the reliance element of Appellant's claim was found by the bankruptcy court to have been satisfied, so the standard applicable to reliance is not at issue in this appeal.

proof presented . . . . Nor was there any evidence that if [Appellant] had come back into possession of 1833 Patrick, she would have sold it before much of her equity had been used up. In fact, her track record strongly suggests otherwise. Thus, regardless of why [Debtor] ended up with 1833 Patrick and what he did with it afterward, he cannot be charged with [Appellant's] ultimate loss of that property.

Memorandum Opinion in Support of Judgment Awarding Partial Relief at 13-14 in Appellant's Appendix at 354-355 (footnote omitted).

Relying on common law restitution theories, Appellant contends that damages for Debtor's "fraud" should be measured by the amount Debtor gained, rather than the amount that she lost. However, Appellant has not asserted a common law fraud case, but rather, a claim of non-dischargeability under § 523(a)(2)(A) of the Bankruptcy Code. That section requires Appellant to prove causation as an element of her claim and, until causation is established by a preponderance of evidence, consideration of damages issues is premature. The bankruptcy court found, based on the evidence Appellant presented, that causation had not been shown. Essentially, the bankruptcy court found that Appellant did not have the ability, financial or otherwise, to retain the Patrick property. Based on the record before us, we cannot say that this finding is clearly erroneous. Therefore, Appellant's § 523(a)(2)(A) claim was properly denied.

#### C. Section 523(a)(6) Claim

Cases interpreting § 523(a)(6) have focused on the need to prove *both* that the debtor's act was intentional and that the debtor intended the resulting harm. *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Mitsubishi Motors Credit of America, Inc. v. Longley (In re Longley)*, 235 B.R. 651 (10th Cir. BAP 1999). Not often discussed, but nonetheless critical to proof of a § 523(a)(6) claim is causation. Thus, "[s]ection 523(a)(6) requires proof of: (1) an intentional action by the defendant; (2) done with the intent to harm; (3) which *causes* damage (economic or physical) to the plaintiff; and (4) the *injury is the proximate result* of the action by the defendant." *Bryant v. Tilley (In re Tilley)*, 286 B.R. 782, 790 (Bankr. D. Colo. 2002) (emphasis added). In this case, Appellant's failure to



establish that Debtor's conduct that induced her to deed the Patrick property to him was the proximate cause of the loss of that property is, again, fatal to her claim.

V.     CONCLUSION

The bankruptcy court's finding that Debtor's misconduct was not what caused Appellant to lose the Patrick property is not clearly erroneous. Applying that finding to § 523(a)(2) and (6), we conclude that Appellant failed to prove her claims as to that property as a matter of law, and we therefore affirm.